DATIN PEGGY TAYLOR

v.

PENINSULAR REALTY CO. SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F.421 OF 1977]
14 NOVEMBER 1988

PROFESSIONS: *Architect - Claim for professional fees - Development project did not commence - Calculation of professional fees based on estimated costs of construction - Basis of estimated costs of construction.*

EVIDENCE: *Admissibility of oral evidence - Purpose of introduction of such evidence - Whether intending to establish the truth of its facts - Whether hearsay.*

The plaintiff as personal representative of the estate of her late husband claims for the recovery of professional fees due to his estate from the defendant. As an architect the deceased had been commissioned by the defendant to drawn up plans and specifications for the construction of 27 units of 4 storey shop houses with flats on the defendant's property at the Tiong Nam Settlement. The project was never commenced by the defendant.

The plaintiff quantified the fees due at RM150,000 which is calculated on the formula of 2/3 of 7½% of the estimated costs of construction which the deceased placed at RM3 million. The defendant adduced evidence that the estimated costs of construction was only RM1,310,664.

Further the defendant alleged that the plaintiff was entitled to claim fees based on 3¼% of the total costs of construction and not 7½% as claimed. This was based on documentary evidence where the deceased authorised one Lim Foo Yong to negotiate settlement of the fees based on 3¼%. The plaintiff sought to introduce evidence of an oral agreement between the deceased and Lim Foo Yong where the fees chargeable was agreed at 7½%. The defendants objected to this oral agreement as being heresay and inadmissible.

Held:

[1] That the oral agreement between the deceased and Lim Foo Yong was hearsay as the intention was to prove the truth of the statements and therefore inadmissible.

[2] That the estimated costs of construction as adduced by the defendant was the more realistic one but the Court would round it up to RM1.5 million to reflect the extra costs of building in a flood prone area.

[3] There was further evidence that for an abandoned project the architect fees payable would be reduced by 50% and not 1/3 as alleged by the plaintiff.

[Accordingly judgment for the plaintiff in the sum of RM28,125 calculated on the formula of ½ x 3¾% x RM1.5 million with interest and costs.]

Case referred to:
Subramaniam v. Public Prosecutor [1956] 22 MLJ 220

For the plaintiff - G. Krishnan; M/s. Krishnan & Co.
For the defendant - V. Pradhan (D.P. Naban with him); M/s. Skrine & Co.

JUDGMENT

Siti Norma Yaakob J:

In this suit, the plaintiff, as the personal representative of her late husband, (the deceased), seeks to recover professional fees due to his estate from the defendant. As an Architect, the deceased had been commissioned by the defendant to draw up plans and specifications for the construction of 27 units of 4 storey shophouses with flats on the defendant's property at Tiong Nam Settlement. The defendant, however, never proceeded with the project and one reason for this may well be due to the fact that they had subsequently sold the land over which the buildings were to be constructed, to a third party.

The plaintiff has quantified the fees due at RM150,000 which is calculated on the formula of 2/3 of 7½% of the estimated costs of construction which the deceased has placed at RM3 million or alternatively the fees claimed is due for services rendered on a *quantum* meruit.

At the outset I wish to state that there was no evidence led on the alternative claim, since the plaintiff herself is in no position to testify as to the very nature of the work undertaken by the deceased, whatmore state the number of man hours he spent on such work. As such, my judgment is confined as to whether the plaintiff has proved liability on the part of the defendant entitling her to judgment for RM150,000 based on her formula of 2/3 x 7½% x RM3 million.

From both the documentary and the oral evidence of PW2, the Quantity Surveyor who estimated the construction costs of the project, DW1, and DW2, the Architect and the draftsman in the deceased's firm, it is very clear that the deceased had provided his professional services to the defendant for the Tiong Nam project. In the absence of any letter of appointment, it is hardly expected that such services were intended to be gratuitous. It was on the architectural plans, P104, that the deceased obtained the planning approval from the authorities. There is evidence that he was the only Architect in his firm who was solely involved and solely responsible for the whole project. From the manner in which the trial proceeded, liability was never questioned as the deceased did a substantial amount of work for the defendant for which he should be rewarded. It is the quantum of such a reward that is highly disputed and I shall now consider the extent of the defendant's liability to meet the plaintiff's claim.

Since an Architect's fees is calculated on a percentage of the estimated costs of construction, I shall first of all determine what is the estimated costs of construction of this abandoned project. There are conflicting evidence on this. For the plaintiff, there is evidence from PW2, the Quantity Surveyor engaged by the deceased to estimate the costs, placing such costs at RM2,640,800 (P103) and which has been rounded up by the deceased to RM3 million. In disputing this figure, the defendant relies on the evidence of DW1, the architect who did the initial sketch designs of the project on the instructions of the deceased. He estimates the costs based on what such buildings would costs if constructed on grounds similar to that found in Tiong Nam Settlement. For this, he chooses a similar project in Batu Road that was also undertaken by the deceased's firm at about the same time, as being comparable estimate costs for the Tiong Nam project. For the Batu Road project the costs of constructing 1 unit shophouse was RM128,000 over a land area calculated at RM8.95 per sq. foot. Basing this calculation on the area of the Tiong Nam project, he estimates the construction costs a RM1,191,513.50. Since the Batu Road project was started in 1967, and that the Tiong Nam project, if it had been proceeded with, would have started in 1970, DW1 also added a 10% increase to his estimates to reflect the increase in costs for the intervening four years, thereby arriving at a total adjusted costs of RM1,310,664.

My only comment to DW1's evidence is that he had not considered that the Tiong Nam area was prone to flooding, as evidence by AB 69,72 and 84, a fact that he was not aware of, but which would invariably increase the costs of construction.

As for P103, PW2 was not able to verify how he had estimated the costs at RM2,646,800 but on the other hand, he admits that it is quite proper to base such estimates on a comparative building which had already been constructed and agrees that the costs of a completed 4-storey shophouse in Batu Road is comparable to a similar shophouse to be constructed in Tiong Nam Settlement.

From AB 90, it is clear that the defendant had abandoned the project sometime in 1970, and this would mean that PW2's estimates, P103, prepared in 1977 was based on prices then prevailing and would therefore, not truly reflect the estimated construction costs for 1970, when the project would have commenced if it was not abandoned.

On the evidence as presented, I am more prepared to accept DW1's estimates as being more realistic and more appropriate in point of time but I would like to round up his estimates to RM1.5 million to reflect the extra costs of building on a flood prone area.

On this estimated costs, the plaintiff now claims the fees chargeable at 7½% being the fees orally agreed between the deceased and the defendant's representative, one Lim Foo Yong. The plaintiff became aware of this oral agreement following a telephone conversation she had with the deceased who was then in England undergoing medical treatment. He had then instructed her to bill the defendant in the formula stated in AB97 and which is now claimed by her.

Objection was taken to the admissibility of the oral agreement on the grounds that:

(1) the plaintiff never disclosed the presence of such an oral agreement before the trial particularly in her affidavit supporting her application for summary judgment under O. 14.

(2) such evidence is inadmissable as being hearsay and tending to establish the truth of the oral agreement.

(3) there is evidence in AB 92 wherein the deceased had authorised Mr. Lim Foo Yong of the defendant company to negotiate on his behalf with the new owners of the property to settle his professional fees at not less than 3¼% of the total costs of the project.

(4) in two other similar suits filed by the deceased against companies related to the defendant, the deceased had limited his claim for his professional fees at 3 3/4% of the total costs of construction.

The defendant maintains that at best the deceased is only entitled to charge 3¼% on the costs of construction as his professional fees.

In para. 3 of the statement of claim the deceased had pleaded that the RM150,000 was calculated in accordance with the agreed percentage for abandoned fees which the plaintiff later clarified in her affidavit in reply to her O. 14 application as being the normal scale of professional charges specified by the Malaysian Institute of Architect (PAM) where no express contract of appointment is drawn up. From this affidavit, it is clear that all along the plaintiff was charging the 7½% on the scale set by PAM but at the trial had abandoned it in preference to an alleged oral agreement reached between the deceased and Lim Foo Yong.

The fact that Lim Foo Yong was not called to testify should no be taken against the defendant as it is settled law that parties to a suit are bound by their own pleadings and since the plaintiff had never pleaded the existence of any oral agreement, the defendant could not be blamed for failing to call him to rebut the evidence of the alleged oral agreement. Moreover he has already denied the existence of an agreement, written or otherwise, to a percentage or to abandonment fees, in his affidavit opposing the O. 14 application and his presence at the trial would not therefore resolve the dispute as to whether there was or was not any oral agreement as to the percentage of fees.

As for the admissibility of the plaintiff's evidence on the oral agreement, this must depend on the purpose of its introduction. Under the circumstances of this case, I can only conclude that its introduction can only be to establish the truth of the existence of the oral agreement which following the decision of *Subramaniam v. Public Prosecutor* [1956] 22 MLJ 220, is heresay and inadmissible.

However, there is AB 92, a letter written by the deceased authorising Lim Foo Yong to negotiate with the new owners of the land on his behalf and to claim his fees at not less than 3¼% of the total costs of construction. The plaintiff explained that the deceased had sought a reduced percentage for his fees so as to conclude an early settlement of the matter but that the reduced percentage is no longer applicable as the offer was not accepted within the one year set for settlement. Correspondence on this purposed settlement in the Agreed Bundle of Documents do not mention any limitation period for settlement and since the plaintiff's involvement in the deceased's professional affairs only extends to submitting bills for payment, I have my own reservations about her testifying to matters for which she has no knowledge of.

The defendant maintains that the percentage of fees could not possibly exceed 3 3/4% as agreed to by the deceased in two other similar suits brought by him against companies related to the defendant. Based on this reliance, the defendant has pleaded in para. 4 of their statement of defence that they are agreeable to the deceased charging his fees at 3 3/4%. Since there is no evidence of any agreement fixing the percentage of fees at 7½% but that there is evidence at AB 92 alluding to fees to be charged at not less than 3¼%. I shall however allow the percentage of fees to be charged at 3 3/4% following the defendant's submission in para. 3 of their statement of defence.

Since the whole project was abandoned, the plaintiff has also claimed 2/3 on the fees chargeable but has not adduced any evidence to support her claim. On the contrary, both PW3 and DW1 who are Architects, testified that for an abandoned project, the fees payable would be reduced by 50% and on their unchallenged evidence, the fees payable to the deceased is hereby reduced to ½ and not 2/3 as demanded by the plaintiff.

On the whole then there will be judgment to the plaintiff on the formula of ½ x 3 3/4% X RM1.5 million = RM28,125, interest at 8% p.a. from date hereof to date of realisation and costs.

Also found at [1990] 1 CLJ 254